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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HENRY DONALD FLOWERS, Defendant and Appellant.	B269656 (Los Angeles County Super. Ct. No. YA053776)

APPEAL from an order of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed.

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

On February 26, 2004, a jury convicted defendant and appellant Henry Donald Flowers of driving in willful or wanton disregard for safety while fleeing from a pursuing police officer (Veh. Code, § 2800.2, subd. (a)) and two counts of leaving the scene of an accident (Veh. Code, § 20001, subd. (a)). The trial court found true allegations that defendant had suffered two prior convictions within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)).[1] The trial court sentenced defendant to two consecutive terms of 25 years to life pursuant to the Three Strikes law.[2]

On March 22, 2013, defendant filed a petition for recall of sentence in the trial court, pursuant to section 1170.126.[3] The trial court issued an order to show cause, and the parties filed written briefs addressing the issue of whether relief should be granted to defendant.

After conducting a hearing on the issue, the trial court denied defendant's petition pursuant to section 1170.126, subdivision (f). In a 21-page memorandum of decision, the trial court summarized the applicable law and rejected defendant's contention that the phrase "unreasonable risk of danger to public

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant appealed the judgment of conviction, and on September 30, 2005, we affirmed the judgment. (*People v. Flowers* (Sept. 30, 2005, B175317) [nonpub. opn.].)

[3] On March 6, 2013, defendant filed a petition in pro. per. His petition was forwarded to the "writ center," and the Post Conviction Assistance Center subsequently filed the operative petition for recall of sentence.

safety" set forth in Proposition 47 (§ 1170.18, subd. (c)) applies in the context of a petition under Proposition 36 (§ 1170.126). The trial court then detailed defendant's criminal history, the facts relating to the instant commitment offense, defendant's disciplinary history, rehabilitative programming, postrelease plans, and other relevant evidence. Considering all this evidence, the trial court determined that resentencing defendant would pose an unreasonable risk of danger to public safety.

Defendant timely filed a notice of appeal. He argues that he is eligible for resentencing because (1) the Three Strikes law has a strong presumption that a defendant whose third strike is not violent or serious should not receive an indeterminate life sentence absent exceptional circumstances; (2) due process requires that a section 1170.126 petition be granted unless there is a rational nexus between the evidence in the record and a finding that the defendant currently poses an unreasonable risk of danger to public safety; (3) the language of Proposition 47 clarified the definition of the phrase "unreasonable risk of danger to public safety" to section 1170.126 petitions for resentencing; and (4) the trial court erred by failing to apply the proper legal standard and by erroneously finding a nexus between defendant's past criminal conduct and the current risk of danger he poses to the public.

We affirm.

DISCUSSION

I. *There is no presumption in favor of resentencing*

Defendant argues that he is entitled to resentencing pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (the Act); he claims that he is subject to a second strike sentence.

Defendant's argument is flawed because there is no expectation or presumption that a petitioner under the Act will be sentenced to a second strike sentence. This contention by defendant is based on the "shall"/"unless" formulation employed in subdivision (f) of section 1170.126. The Court of Appeal has previously rejected such a contention (*People v. Buford* (2016) 4 Cal.App.5th 886, 901–903, review granted Jan. 11, 2017, S238790) and defendant offers no compelling reason to depart from that holding. The Act does not create an expectation or presumption that under its provisions a petitioner under the Act would be resentenced as a second striker.

In a similar vein, defendant argues that there is a "'strong presumption' that a defendant whose third strike is not violent or serious should not receive an indeterminate life sentence." In other words, a petitioner who is found eligible for section 1170.126 relief will also be found eligible for relief absent "[e]xceptional [c]ircumstances." Defendant's argument finds no support in the statutory language. Had the voters intended such relief, they would have said so, instead of employing language that affords broad discretion to find dangerousness.

II. *No due process liberty interest at stake*

Defendant contends that he has a liberty interest in resentencing under Proposition 36 protected under the federal guarantee of due process of law (U.S. Const., 5th & 14th Amends.) and the comparable but broader state guarantee of due process of law (Cal. Const., art. 1, §§ 7, subd. (a), 15). He argues that "[s]ection 1170.126 is analogous to the liberty interest recognized in [*Greenholtz v. Inmates of Nebraska Penal & Correctional Complex* (1979) 442 U.S. 1] and [*Board of Pardons v. Allen* (1987) 482 U.S. 369] because it involves lessening the

sentences of life prisoners unless a designated finding is made." He further points out that under the California Constitution, our Supreme Court has held that "when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decision-making and in being treated with respect and dignity." (*People v. Ramirez* (1979) 25 Cal.3d 260, 268.) To protect such interest, he posits that when a resentencing petition is denied, a nexus must be "established by some evidence on the record and the conclusion that the inmate poses a current risk of danger to public safety, after conducting a particularized assessment of the inmate's individual circumstances."

We are not persuaded by defendant's claim of a constitutional liberty interest in resentencing under Proposition 36. First, for life sentences, there is a mandatory minimum amount of prison time that must be served before an inmate can be considered for parole. (see § 3046.) Section 1170.126, on the other hand, provides no mandatory minimum number of years that must be served before petitioning for a sentence reduction.

Second, pursuant to statute, the Parole Board "'shall normally set a parole release date' one year prior to the inmate's minimum eligible parole release date." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1202.) In other words, the statutory scheme provides defendants who are convicted of crimes carrying life terms with a "due process liberty interest in parole" and "'an expectation that they will be granted parole unless the [Parole] Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.'" (*In re Lawrence, supra,* at pp. 1191, 1204.) Third strike prisoners have the same expectation of parole

associated with their life sentences, but their original sentence provided no expectation of a sentence reduction.

A third difference is the mandatory language of the parole provisions. Unlike section 1170.126, none of the relevant parole provisions uses the word "may." The Parole Board and the governor, while having great discretion regarding parole, "*must* consider the statutory factors concerning parole suitability set forth in section 3041 as well as the [Parole] Board regulations." (*In re Prather* (2010) 50 Cal.4th 238, 251, italics added.) In contrast, the trial court "may" consider the factors set forth in section 1170.126 when assessing a defendant's risk of dangerousness.

III. *Proposition 47 definition of danger is inapplicable to Proposition 36*

Defendant argues that the enactment of Proposition 47 clarified the definition of the phrase "unreasonable risk of danger to public safety" as it applies to section 1170.126 petitions for resentencing.

On February 18, 2015, our Supreme Court granted review in *People v. Valencia* (2014) 232 Cal.App.4th 514 (*Valencia*), S223825. The applicability of Proposition 47's danger definition in the Proposition 36 context is pending before that Court in both *Valencia*, *supra*, S223825, and *People v. Chaney* (2014) 231 Cal.App.4th 1391 (*Chaney*) review granted, February 18, 2015, S223676.

In view of the posture of this issue, we shall not belabor the point but simply conclude, as did the court in *People v. Esparza*

(2015) 242 Cal.App.4th 726 (*Esparza*),[4] that the voters in enacting Proposition 47 did not intend for its definition of danger to extend to petitions under Proposition 36, and thus such definition is inapplicable here.

IV. *The trial court did not abuse its discretion in denying defendant's petition*

As the parties agree, we review the trial court's order for abuse of discretion. "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

In a lengthy, detailed order, the trial court summarized the evidence and considered defendant's criminal history, institutional behavior, rehabilitative programming, postrelease plans, psychological evaluation, and recidivism risk scores before denying his petition. The trial court relied on the language of section 1170.126 and cases governing the suitability for release

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[4] No petition for review was filed or review granted in *Esparza*, which came from the Sixth Appellate District. In a subsequent Sixth Appellate District case, the majority noted that *Esparza* was the only extant decision on this issue and rejected its conclusion. (*People v. Cordova* (2016) 248 Cal.App.4th 543, 552, fn. 8, review granted Aug. 31, 2016, S236179 (*Cordova*).) In granting review in *Cordova*, the Court deferred further action pending resolution of a related issue in *Chaney*, *supra*, S223676, and *Valencia*, *supra*, S223825. We decline to consider the *Cordova* majority opinion persuasive on this point. (Cal. Rules of Court, rules 8.1105, 8.1115.)

on parole to guide its interpretation of "unreasonable risk of danger" and its ultimate decision. The trial court did not abuse its discretion.

In urging us to reverse, defendant argues that the trial court failed to consider his rehabilitation in the context of his young age when he committed the current offenses, that there was no rational nexus between the trial court's finding of current dangerousness and defendant's rule violations in prison, that defendant's risk of recidivism does not indicate that he would pose an unreasonable risk of danger to the community, and that the trial court did not properly consider defendant's reentry plan. But, defendant has not shown that the trial court's exercise of discretion was arbitrary or capricious.

Rather, based upon the express language in the trial court's order, the trial court recognized that it had to determine, "in its discretion, [whether] resentencing [defendant] would pose an unreasonable risk of danger to public safety." The trial court also recognized that it had to determine whether defendant "*currently* poses an unreasonable risk of danger to public safety if resentenced." The trial court then set forth the factors that it could consider and, in fact, did consider, namely defendant's criminal history and the facts of the commitment offense. While defendant claims that the trial court failed to consider his age, the record shows otherwise. The trial court specifically referenced defendant's age when discussing defendant's past and current behavior.

The trial court also reviewed defendant's record of discipline and rehabilitation in prison. The trial court noted that defendant's disciplinary history showed that he had engaged in dangerous acts in prison. Also, the trial court found that his

possession of a cell phone constituted dangerous contraband because it could allow an inmate to conduct illicit activities outside of prison.

Defendant contends that there is no nexus between his past criminality and his rule violation for possession of a cell phone. We disagree. Defendant's willingness to break prison rules is indicative of his lack of rehabilitation and current criminality. (*In re Bettencourt* (2007) 156 Cal.App.4th 780, 805.) Similarly, there is a nexus between defendant's past criminality and his rule violations for controlled substances. Defendant currently has a drug problem and, as the trial court found, his drug use escalated in prison. While there is no evidence that drug use was a part of defendant's past criminality, his current drug use shows his lack of rehabilitation and current criminality. Defendant has not rehabilitated himself in prison. Instead, he acquired a drug problem and violated a prison rule prohibiting the possession and/or use of a controlled substance on prison grounds as a result.

Finally, the trial court addressed defendant's risk assessments for recidivism and his California Department of Corrections and Rehabilitation classification score. As the trial court rightly determined, defendant's risk assessment scores are evidence of current dangerousness. (*In re Stevenson* (2013) 213 Cal.App.4th 841, 869–870.)

Dr. Hy Malinek's assessment of defendant's risk of recidivism as "moderate" does not compel a different result. The trial court considered Dr. Malinek's testimony and still found him to pose an unreasonable risk of danger to public safety. Defendant has not shown how the trial court's conclusion constitutes an abuse of discretion.

DISPOSITION

The order is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J. *
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.